

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

STARLINE WINDOWS INC. et. al.,

Plaintiffs,

v.

QUANEX BUILDING PRODUCTS  
CORP. et al.,

Defendant.

Case No.: 3:15-cv-01282

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS [Doc. 7] AND  
PLAINTIFFS' MOTION TO STRIKE  
[Doc. 19]**

Pending before the Court is Defendants'<sup>1</sup> Motion to Dismiss Plaintiffs'<sup>2</sup> first and fifth causes of action and Plaintiffs' Motion to Strike portions of Defendants' reply brief. The Court decides the matter on the papers submitted and without oral argument. See Civ. L. R. 7.1(d.1). For the reasons stated below, the Court **DENIES** both motions.

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<sup>1</sup> The Defendants in this action are Quanex Building Products Corporation and Truseal Technologies, Inc.

<sup>2</sup> The Plaintiffs in this action are Starline Windows, Inc.; Starline Architectural Windows LTD.; and Vitrum Industries LTD.

1     **I. BACKGROUND**

2       Plaintiffs are a group of companies engaged in the manufacture and distribution of  
 3 window products. (FAC ¶ 13). Defendants are manufacturers of a particular kind of  
 4 sealant known as polyisobutylene sealant (“PIB”). (Id.) Defendants sold their PIB  
 5 product to Plaintiffs, who then used the PIB to make glass components known as  
 6 Insulated Glass Units (“IGUs”). (Id. ¶ 13.)

7       IGUs are used in the construction of double- and triple-paned windows. The IGU  
 8 itself consists of one or more panes of glass separated by one or more sealed airspaces  
 9 created by the use of a spacer bar inserted between the panes of glass. Plaintiffs installed  
 10 these IGUs in the construction of a number of residential properties. (FAC ¶ 21.)  
 11 Subsequent to installation, the PIB “failed, deteriorated, and migrated, staining,  
 12 saturating, obscuring, bonding to and/or otherwise damaging other components of the  
 13 IGUs, windows, and/or window assemblies, including but not limited to glass, spacer  
 14 bars, coatings, desiccant, glazing beads, and frames.” (Id. ¶ 23.) As a result of this  
 15 damage caused by the PIB, Plaintiffs have incurred liability to homeowners. (Id. ¶¶ 22,  
 16 24.)

17       On September 17, 2015, Plaintiffs filed a First Amended Complaint against  
 18 Defendants alleging (1) strict products liability; (2) breach of contract; (3) breach of the  
 19 implied warranty of merchantability; (4) breach of the implied warranty of fitness; (5)  
 20 negligence; (6) violation of Business and Professions Code § 17200; (7) violation of  
 21 Business and Professions Code § 17500; and (8) unjust enrichment. (See FAC.)  
 22 Defendants now move to dismiss the strict products liability and negligence causes of  
 23 action, arguing they are precluded by the economic loss rule. (See MTD.) Plaintiffs  
 24 oppose, and move to strike portions of Defendants’ reply brief. (See Opp’n [Doc. 15];  
 25 MTS [Doc. 19].)

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1       **II. MOTION TO STRIKE**

2       Plaintiffs contend the Court should strike a portion of Defendants' reply brief.  
 3       Specifically, Plaintiffs argue that Defendants' reference to the *KB Home* factors is  
 4       improper because their mention amounts to a new legal theory not raised in Quanex's  
 5       Motion to Dismiss. (See MTS.) It is well established that a court "need not consider  
 6       arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F. 3d 990,  
 7       997 (9th Cir. 2007). However, a court may consider arguments which, though not raised  
 8       in the initial motion, are responsive to arguments made in an opposition brief. *See*  
 9       *Koerner v. Grigas*, 328 F.3d 1039, 1048–49 (9th Cir. 2003).

10       Here, Plaintiffs' Opposition cites to *KB Home v. Superior Court* 112 Cal. App. 4th  
 11       1076 (2003), numerous times for the proposition that the economic loss rule does not  
 12       preclude recovery in tort where the product at issue causes damage to a separate product.  
 13       (See Opp'n 5, 8–9, 12.) In their reply, Defendants argue that the *KB Home* factor test for  
 14       determining what the "product at issue" is supports a finding that the PIB sealant and the  
 15       IGUs became one single "product" once the former component was incorporated into the  
 16       latter. By arguing that the products are thus not "separate", Defendants are directly  
 17       responding to Plaintiffs' argument that the economic loss rule should not preclude  
 18       recovery where, as here, one "product" (the PIB) damages an allegedly separate product  
 19       (the IGUs). Accordingly, the Court **DENIES** Plaintiffs' Motion to Strike.

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1     **III. MOTION TO DISMISS**

2       Defendants seek dismissal of Plaintiffs' strict products liability and negligence  
 3 causes of action on the theory that the economic loss rule precludes any recovery in tort  
 4 for economic damages stemming from a breach of contract.

5     **A. Legal Standard**

6       The court must dismiss a cause of action for failure to state a claim upon which  
 7 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)  
 8 tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n.*, 720 F.2d 578,  
 9 581 (9th Cir. 1983). All material allegations in the complaint, "even if doubtful in fact,"  
 10 are assumed to be true. *Id.* The court must assume the truth of all factual allegations and  
 11 "construe them in the light most favorable to [the nonmoving party]." *Gompper v. VISX,*  
 12 *Inc.*, 298 F.3d 893, 895 (9th Cir. 2002); *see also Walleri v. Fed. Home Loan Bank of*  
 13 *Seattle*, 83 F.3d 1575, 1580 (9th Cir. 1996).

14       As the Supreme Court has explained, "[w]hile a complaint attacked by a Rule  
 15 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's  
 16 obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels  
 17 and conclusions, and a formulaic recitation of the elements of a cause of action will not  
 18 do." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964–65 (2007) (internal citations and  
 19 quotation marks omitted). Instead, the allegations in the complaint "must be enough to  
 20 raise a right to relief above the speculative level." *Id.* at 1965. A complaint may be  
 21 dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient  
 22 facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,  
 23 534 (9th Cir. 1984).

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1           **B. Economic Loss Rule**

2           The economic loss rule bars a plaintiff from recovering tort damages stemming  
 3 from economic loss caused by a breach of contract. 6 Witkin, Summary 10th (2005)  
 4 Torts, § 1514, p. 971. “Economic loss,” in the products liability context, includes  
 5 “damages for inadequate value, costs of repair and replacement of the defective product  
 6 or consequent loss of profits. . . .” *Jimenez v. Superior Court*, 29 Cal. 4th 473, 482  
 7 (2002) (internal citations and quotation marks omitted). However, economic loss does  
 8 not include damages that one product causes to another product. *Id.* Thus, “the  
 9 economic loss rule allows a plaintiff to recover. . . in tort. . . when a product defect causes  
 10 damage to ‘other property’ that is, *property other than the product itself.*” *Id.* at 483  
 11 (emphasis original).

12          Here, Plaintiffs allege that “[t]he PIB has failed, deteriorated, and migrated,  
 13 staining, saturating, obscuring, bonding to, and/or otherwise damaging other components  
 14 of the IGUs, windows, and/or window assemblies, including but not limited to glass,  
 15 spacer bars, coatings, desiccant, glazing beads, and frames.” (FAC ¶ 23.) Defendants  
 16 contend that this damage allegedly caused by the PIB does not amount to damage to  
 17 “property other than the product itself” because the applicable “product” for purposes of  
 18 the economic loss rule is the IGU, not the PIB.<sup>3</sup> Thus, the dispositive question presented  
 19 by this motion is whether the PIB lost its identity as an independent product upon its  
 20 incorporation into the larger window assembly.

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 24          <sup>3</sup> Defendants argue under a separate heading that Plaintiffs’ allegations that the PIB damaged property  
 25 other than the product itself is a mere conclusion that fails to pass muster under the *Iqbal / Twombly*  
 26 standard. (MTD 8:1–9:8; Reply 3:12–4:15.) The Court finds this argument unpersuasive because  
 27 paragraphs 23, 33, and 60 are highly particularized in alleging that the PIB deteriorated and migrated  
 28 thereby causing damage to other components of the IGUs such as the glass, spacer bars, coatings,  
 desiccant, glazing beads, and frames when the PIB. Thus, the First Amended Complaint is not deficient  
 for want of particularity regarding how the PIBs caused damage to “other property.” Rather, the  
 dispositive question is whether these other components qualify as products distinct from the PIB.

1        *KB Home* provides guidance on this question. In *KB Home*, a stainless steel rod  
 2 installed inside of furnaces for the purpose of limiting nitrous oxide emissions caused  
 3 damage to other components of the furnaces. The trial court reasoned that the NOx rods  
 4 were not a product independent of the furnace and therefore dismissed the tort claims  
 5 against the NOx rod manufacturer. The California Court of Appeal reversed. In doing  
 6 so, the court reasoned that

7                 distinguishing between ‘other property’ and the defective product itself in a  
 8 case involving component-to-component damage requires a determination  
 9 whether the defective part is a sufficiently discrete element of the larger  
 10 product that it is not reasonable to expect its failure invariably to damage  
 11 other portions of the finished product. If that is the case, permitting tort  
 12 recovery when the defective part causes physical injury to other components  
 13 is consistent with the underlying principle recognizing a manufacturer’s  
 14 liability in tort by requiring his goods to match a standard of safety defined  
 15 in terms of conditions that create unreasonable risks of harm.

16        *KB Home*, 112 Cal. App. 4th at 1087. The court recognized a non-exhaustive list of eight  
 17 factors<sup>4</sup> relevant to this inquiry. However, the Court declined to apply these factors at the  
 18 motion to dismiss stage, reasoning that [r]esolution of this issue . . . should be left to the  
 19 trier of fact.” *Id.* at 1087.

20        This Court agrees with the California Court of Appeal that the issue of whether a  
 21 component part is distinct from the larger product is a fact intensive inquiry inappropriate  
 22 for resolution on a motion to dismiss. Thus, given the current absence of any factual  
 23 record, this Court declines the invitation to apply the *KB Home* factors to determine

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24        <sup>4</sup> (1) whether the component was integral to the function of the larger product; (2) whether the  
 25 component has an independent use to the consumer; (3) whether there is a close relationship between the  
 26 property damage and the inherent nature of the defect in the component; (4) whether the component  
 27 itself or the larger product was placed into the stream of commerce; (5) whether the manufacturer of the  
 28 defective component manufactured other parts of the larger product; (6) whether the larger product is  
 sold in other markets without the component (7) whether the defective component can be readily  
 removed from the larger product; and (8) whether the defective component can serve a function apart  
 from its incorporation into the larger product.

1 whether “the [PIB] is a sufficiently discrete element of the [IGU] such that it is not  
2 reasonable to expect its failure invariably to damage other portions of the finished  
3 product.” Accordingly, the Court **DENIES** Defendants’ Motion to Dismiss.

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5 **IV. CONCLUSION AND ORDER**

6 For the foregoing reasons, the Court **DENIES** Plaintiffs’ Motion to Strike and  
7 Defendants’ Motion to Dismiss.

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9 **IT IS SO ORDERED.**

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11 Dated: June 6, 2016

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Hon. M. James Lorenz  
United States District Judge

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